Supreme Court, U.S.
FILED
2001 APR - 2
OFFICE OF THE CLERK

No. 00-1517

IN THE

Supreme Court of the United States

THOMAS J. MORIARTY,
Petitioner,

v.

JAMES F. SVEC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID S. ALLEN *
JACOBS, BURNS, ORLOVE, STANTON & HERNANDEZ
300 West Washington Street
Suite 1200
Chicago, Illinois 60606-2002
(312) 372-1646
Attorney for Petitioner
* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

168 pp

QUESTIONS PRESENTED

1. Should the federal single-employer doctrine displace State incorporeal-entity-ownership law so an employer can escape ERISA-delinquent-contribution liability.

2. When attorneys for a prevailing ERISA pension plan charge the plan reduced attorney's fees to advance a social cause, should the district court award that depressed rate or the higher-market rate.

PARTIES TO THE PROCEEDINGS

Petitioner Thomas J. Moriarty is a Trustee of the Local Union No. 727, I.B.T. Pension Trust and the Teamsters Local Union No. 727 Health and Welfare and Pension Fund. Neither employee benefit plan has any parent corporation, subsidiaries, or affiliates that have issued shares to the public.

Respondent James F. Svec owns two Illinois unincorporated businesses—Svec & Sons Funeral Home and West Suburban Livery.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Statement of facts	3
1. The labor contract, which the Funds interpret as not requiring contributions for "substantial" owners	3
2. Svec & Son Funeral Home and West Suburban Livery	4
3. *Svec I* holds that the Funeral Home and West Suburban are a "single employer."	4
4. James uses the "single employer" doctrine to escape liability for himself	4
5. The lower courts set the market rate for prosecuting ERISA collection cases at the depressed rate counsel charge to advance the union movement	5

TABLE OF CONTENTS—Continued

Page

REASONS FOR GRANTING THE WRIT 6

A. Using federal law to alter who owns an Illinois business cannot be reconciled with this Court's holdings that there is no federal-common law ... 7

B. The Seventh Circuit's relegating prevailing pension plans to the depressed hourly rate their attorneys charge based on ideological reasons conflicts with the District of Columbia Circuit 11

CONCLUSION 14

TABLE OF AUTHORITIES

Cases	Page
373-381 South Broadway Assoc., 304 NLRB 1108 (1991)	9
Atherton v. FDIC, 519 U.S. 213 (1997)	7, 9
Barrow v. Falck, 977 F.2d 1100 (7th Cir.1992)	12
Beard v. Teska, 31 F.3d 942 (10th Cir.1994)	12
Blanchard v. Bergeron, 489 U.S. 87 (1989)	13
Blum v. Stenson, 465 U.S. 886 (1984)	13
Board of Trustees of Hotel & Restaurant Employees Local 25 Health and Welfare Fund v. JPR, Inc., 136 F.3d 794 (D.C. Cir.1998)	11, 12, 14
Buffington v. Baltimore County, 913 F.2d 113 (4th Cir.1990), *cert. denied*, 499 U.S. 906 (1991)	12
Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998)	6, 9
Covington v. District of Columbia, 57 F.3d 1101 (D.C. Cir.1995), *cert. denied*, 516 U.S. 1115 (1996)	11, 12
Daniel v. Williams, 474 U.S. 327 (1986)	10
Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938)	7
Esmark v. NLRB, 887 F.2d 739 (7th Cir.1989)	9
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994)	14
Goodman Investment Co., Inc., 292 NLRB 340 (1989)	9
Independent Federation of Flight Attendants v. Zipes, 491 U.S. 754 (1989)	14
IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc., 788 F.2d 118 (3rd Cir. 1986)	9
McCann v. Couglin, 698 F.2d 112 (2nd Cir. 1983)	12
Papa v. Katy Indus., Inc., 166 F.3d 937 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999)	9
Parratt v. Taylor, 451 U.S. 527 (1981)	10

TABLE OF AUTHORITIES—Continued

	Page
PBGC v. Ouimet Corp., 711 F.2d 1085 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983)	9
Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986)	14
Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service, 380 U.S. 255 (1965)	7, 9
Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489 (11th Cir.1996)	10
Richmond Convalescent Hospital, Inc., 313 NLRB 1247 (1994)	9
Rogers v. Sugar Tree Products, Inc., 7 F.3d 577 (7th Cir.1993)	9
Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516 (D.C. Cir.1988) (*en banc*)	7, 11, 12, 13
Shakopee Mdewakanton Sioux Community v. City of Prior Lake, 771 F.2d 1153 (8th Cir.1985), *cert. denied*, 475 U.S. 1011 (1986)	12
South Prairie Constr. Co. v. Local 627, Int.'l Union of Operating Eng'rs, 425 U.S. 800 (1976) (*per curiam*)	9
United States v. Bestfoods, 524 U.S. 51 (1998)	10
United States v. Vogel Fertilizer Co., 455 U.S. 16 (1982)	9
Vance v. NLRB, 71 F.3d 486 (4th Cir.1995) (*per curiam*)	9
Vernon v. Schuster, 179 Ill.2d 338, 228 Ill. Dec. 195, 688 N.E.2d 1172 (1997)	8
Wheeldin v. Wheeler, 373 U.S. 647 (1963)	10
Codes	
26 U.S.C. § 1563(a)	9
28 U.S.C. § 1254(1)	1

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 1132(g)(2)(D) 5, 7, 13
29 U.S.C. § 1301(b)(1) 9

Congressional materials

126 Cong. Rec. 23,038 (1980) (Rep. Thompson) 8
Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration (Comm. Print 1980) 8, 13

Miscellaneous

Court says principal owner not an employee, 5 Death Care Business Advisor No. 11 (LRP Publications Dec. 13, 2000), available in LEXIS, Nexis Library, Newsletter Stories file 10
Andrew P. Sutor, IV, Note, *Covington v. District of Columbia: Judicial clouding of a once clear burden of proof in awards of attorney fees under 42 U.S.C. § 1988*, 41 Vill. L. Rev. 825 (1996) 12

IN THE

Supreme Court of the United States

THOMAS J. MORIARTY,

Petitioner,

v.

JAMES F. SVEC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Thomas J. Moriarty petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit to review that court's judgment.

OPINIONS BELOW

The Seventh Circuit's opinions are reported at 233 F.3d 955 and 164 F.3d 323. Pet. App. 3a-47a. The United States District Court for the Northern District of Illinois issued several unreported decisions and orders, and one reported decision at 994 F. Supp. 963. Pet. App. 48a-94a.

JURISDICTION

The court of appeals entered judgment on November 27, 2000. That court denied a timely petition for rehearing and suggestion for rehearing *en banc* on January 3, 2001. Pet. App. 1a-2a. Moriarty invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 502 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1132(g)(2), provides in pertinent part:

> (2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—
>
> (A) the unpaid contributions,
>
> (B) interest on the unpaid contributions,
>
> (C) an amount equal to the greater of—
>
> (i) interest on the unpaid contributions, or
>
> (ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) or the amount determined by the court under subparagraph (A),
>
> (D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and
>
> (E) such other legal or equitable relief as the court deems appropriate.

Section 515 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

STATEMENT OF THE CASE

Statement of facts

This case involves the lower court's using the single-employer doctrine to create federal-common law to decide who owns an Illinois sole proprietorship so it can escape ERISA delinquent-contribution liability. Although the district court rejected the employer's using that doctrine this way, the Seventh Circuit created a new, revenue-based-federal rule for who owns incorporeal entities.

This case also concerns the court's awarding prevailing pension plans reasonable attorney's fees. Although the plan's attorneys depressed their rates to advance the "union movement," the Seventh Circuit held that they were not entitled to full-market rates unless they first inflated—and then lowered—their rates.

1. *The labor contract, which the Funds interpret as not requiring contributions for "substantial" owners.*

The Funeral Directors Services Association of Greater Chicago—an employer association of funeral homes and livery services—represents its constituents in collective bargaining with I.B.T. Local 727. Pet. App. 95a-96a ¶¶ 1, 4. The 1985-1988 funeral directors' labor contract required Association members to contribute to the Health and Welfare and Pension Funds for their full-time and trainee "employees," a term the contract defined as "[a]ny member of the Union who is in the employ of an employer member who is licensed to and who does embalming and/or funeral directing . . . ." Pet. App. 108a-110a, 122a. But this contract did not require pension contributions during a trainee's first year. Pet. App. 109a.

Besides the contract's express exclusion, the Funds' trustees interpret its requiring contributions for "employees" as excusing owners from contributing for themselves. Pet. App. 96a-97a ¶¶ 9-10. Before 1993, the Fund relieved

"significant" or "substantial" owners from having to contribute, evaluating employers on a case-by-case basis to see if their owners met the significant or substantial threshold. Pet. App. 96a-97a ¶ 9.

2. *Svec & Son Funeral Home and West Suburban Livery.*

James Svec and his sister Sharon own Svec & Sons Funeral Home and West Suburban Livery, which he operates as two sole proprietorships. Pet. App. 9a n.2, 23a, 97a-98a ¶¶ 12-13, 18. Before his death on June 29, 1987, their father—Elmer Svec—owned the Funeral Home, while Elmer and James owned West Suburban. Pet. App. 97a-98a ¶¶ 13, 18.

The Funeral Home was a contributing employer to the Funds; West Suburban was not. Pet. App. 98a ¶ 16. James was a funeral director at the Funeral Home and a Union member. Pet. App. 97a-98a ¶¶ 11, 15.

3. *Svec I holds that the Funeral Home and West Suburban are a "single employer."*

Funds' trustee Moriarty sued James under ERISA to collect delinquent contributions for work: (1) James performed at the Funeral Home; and (2) West Suburban's employees performed.

In *Svec I*, the district court held—and the Seventh Circuit affirmed—that both businesses were a "single employer," making James liable for contributions for West Suburban's employees. Pet. App. 37a-44a, 90a-93a.

4. *James uses the "single employer" doctrine to escape liability for himself.*

On remand from *Svec I*, the parties' dispute focused on James's liability for work he did at the Funeral Home during the six months before his father's death. Although James didn't own the Funeral Home during that time, he asked the district court to use the single-employer doctrine to lump the

Funeral Home and West Suburban's ownership together to make him own both. Owning the integrated enterprise, James reasoned, entitled him to invoke the Funds' substantial owner exception so he could escape ERISA liability.

Although the district court rejected this argument, the Seventh Circuit held that James could use the rule to make himself an owner of the combined Funeral Home/West Suburban integrated enterprise to invoke the Funds' ownership exclusion. Pet. App. 9a-10a, 13a, 62a-63a. The Seventh Circuit directed the district court to measure James's ownership by the Funeral Home and West Suburban's annual revenues; according to the court, this is the standard "the NLRB uses in its applications of the single employer doctrine." Pet. App. 10a.

5. *The lower courts set the market rate for prosecuting ERISA collection cases at the depressed rate counsel charge to advance the union movement.*

After successfully prosecuting this action, Moriarty asked the district court for attorney's fees under 29 U.S.C. § 1132(g)(2)(D). Although his attorneys charged him $165 per hour to subsidize the union movement, Moriarty sought hourly rates between $250 and $345. Pet. App. 123a ¶ 2, 127a ¶ 8, 132a ¶ 2. The district court received evidence showing:

- after successfully defending another funeral home against Moriarty's collection lawsuit, Jenner & Block revealed that they charge employers in the $300/hour range for defending such cases;
- Vedder Price Kaufman & Kammholz bills multi-employer plans between $245 and $310/hour;
- James's attorneys'—Seyfarth Shaw—charged him $270 for a nineteen-year partner and $160 for a third-year associate; and

- two other Chicago union-side law firms charge multiemployer pension plans $160 per hour to advance the union movement.

Pet. App. 126a-127a ¶ 7, 135a ¶ 5, 136 ¶ 5, 137a ¶ 6, 138a ¶ 6, 140a ¶ 4, 142 ¶ 2, 143 ¶ 2.

Although the district court did not question Moriarty's lawyers' altruistic motives in setting their rates, it held that $165 is "the market rate for attorneys prosecuting ERISA collection actions . . . ." Pet. App. 56a. The Seventh Circuit agreed, noting that "[i]f an attorney charges most clients a high fee, and then represents a client pro bono or for a reduced fee, the attorney's presumable market rate in the pro bono or reduced-fee case is still the attorney's normal high rate." Pet. App. 16a. This was not such a case, the court held, because Moriarty's counsel "does not have a high, regular rate from which it deviates to make gifts to unions." *Id.*

REASONS FOR GRANTING THE WRIT

This case presents two important, specific ERISA issues: *first*, should federal or State law define who owns an ERISA employer; and *second*, when a pension plan prevails in a delinquent-contribution case, should its attorney's fees be based on its cost—the depressed rate its attorneys charge the plan—or the market rate for similarly situated attorneys.

Although it was not interpreting a federal statute, the Seventh Circuit allowed an employer to use the federal-single-employer doctrine to realign who owns an Illinois sole proprietorship so it could escape ERISA delinquent contribution liability. The Seventh Circuit's using the single-employer rule to trump State incorporeal-entity-ownership law:

- flaunts this Court's precedent—most recently *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754-755 (1998)—that federal courts can't create federal-common law from whole cloth;

- conflicts with *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Service*, 380 U.S. 255 (1965) on the correct use of the single-employer doctrine; and
- transcends this ERISA delinquent contributions case.

On the second issue, a prevailing pension plan is entitled to "reasonable attorney's fees . . . ." 29 U.S.C. § 1132(g)(2)(D). Although this pension plan's attorneys charge a reduced-hourly fee to advance the "union movement," the Seventh Circuit held they were not entitled to full-market rates because they had never charged those rates. The Seventh Circuit's refusing to award public-spirited attorneys full-market rates:

- directly conflicts with the District of Columbia Circuit's decision in *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516 (D.C. Cir.1988) (*en banc*) and its progeny;
- will spill over to other fee-shifting statutes; and
- will produce the anomalous result *Hodel* predicted: either competent, public-spirited counsel will refuse these cases, or will resort to questionable billing practices.

A. Using federal law to alter who owns an Illinois business cannot be reconciled with this Court's holdings that there is no federal-common law.

The first problem with the Seventh Circuit's decision is its erroneously assuming that federal courts are authorized to alter who owns an Illinois sole proprietorship so it can escape ERISA liability. Without a federal statute to interpret—or some federal interest to vindicate—this Court firmly holds that " '[t]here is no federal general common law.' " *Atherton v. FDIC*, 519 U.S. 213, 218 (1997), *quoting*, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). And Illinois follows the "well settled" rule "that a sole proprietorship has no legal

identity separate from that of the individual who owns it." *Vernon v. Schuster*, 179 Ill.2d 338, 347, 228 Ill. Dec. 195, 199-200, 688 N.E.2d 1172, 1176-1177 (1997). Under Illinois law, Elmer Svec owned the Funeral Home and his son James did not. The Seventh Circuit should have affirmed the district court's holding that James could not avail himself of the "substantial owner" exception.

When it engaged in the metamorphosis of transforming James Svec from owning none of the Funeral Home to its quarter owner, the Seventh Circuit didn't claim to interpret a federal statute. It identified no federal interest in changing who owns a business entity created under State law, and we can't fathom one. Congress's goal in adding ERISA § 515 was to "permit trustees of plans to recover delinquent contributions efficaciously . . . ." 126 Cong. Rec. 23,038, 23,039 (1980) (Rep. Thompson); Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076: The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration, at 43-44 (Comm. Print 1980) (herein "Senate Committee Print"). This legislative history shows that Congress sought to curb employers' failing to "make promised contributions in a timely fashion" because the costs associated with collecting them would not only "detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans," but would also harm plans' participants and beneficiaries through "lower benefits," and adversely affect responsible employers through "higher contribution rates . . . ." Using the single-employer doctrine to alter who owns an Illinois business so it can avoid contributing to the Funds defeats—rather than furthers—those interests.

Moreover, there is nothing in the single-employer doctrine that counsels using it to change who owns a business. That rule measures if "nominally separate business entities" are actually one employer because they have interrelated

operations, common management, centralized labor relations, and common ownership. *Radio and Television Broadcast Technicians Local 1264*, 380 U.S. at 256; *see South Prairie Constr. Co. v. Local 627, Int.'l Union of Operating Eng'rs*, 425 U.S. 800 (1976) (*per curiam*); *Vance v. NLRB*, 71 F.3d 486, 490 (4th Cir.1995) (*per curiam*); *Esmark v. NLRB*, 887 F.2d 739, 752-754 (7th Cir.1989); *373-381 South Broadway Assoc.*, 304 NLRB 1108 n. 6 (1991); *Goodman Investment Co., Inc.*, 292 NLRB 340, 347 (1989). But in none of these cases have the courts or Labor Board tampered with the entity's extant ownership infrastructure. In fact, they have held that two entities were not an integrated enterprise even when they shared common ownership. *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 583 (7th Cir.1993), *abrogated on other grounds, Papa v. Katy Indus., Inc.*, 166 F.3d 937 (7th Cir.), *cert. denied*, 528 U.S. 1019 (1999); *Richmond Convalescent Hospital, Inc.*, 313 NLRB 1247, 1249-1250 (1994).

Of course, this would be a different case if the Seventh Circuit had interpreted who is the "employer" under ERISA § 515. That would not be "federal common law in 'the strictest sense, *i.e.*, a rule of decision that amounts to, not simply to an interpretation of a federal statute . . ., but, rather, to the judicial 'creation' of a special federal rule of decision.' " *Burlington Indus., Inc.*, 524 U.S. at 755, *quoting*, *Atherton*, 519 U.S. at 218. When Congress wants federal courts to tinker with who owns incorporeal abstractions, it does so expressly, allowing the courts to flesh out the statutory gaps with federal-common law. 29 U.S.C. § 1301(b)(1); 26 U.S.C. § 1563(a); *see United States v. Vogel Fertilizer Co.*, 455 U.S. 16 (1982); *IUE AFL-CIO Pension Fund v. Barker & Williamson, Inc.*, 788 F.2d 118, 123-124 (3rd Cir.1986); *PBGC v. Ouimet Corp.*, 711 F.2d 1085, 1094 (1st Cir.), *cert. denied*, 464 U.S. 961 (1983). But the Seventh Circuit did not decide who the statutory employer is; it ruled

who owns that employer using a federal standard. Pet. App. 9a-10a, 13a.

If this were only a dispute over this employer's need to contribute to this Fund under ERISA, the court's error might not merit review. After all, James will surely point out that the contributions the Funeral Home might owe for his work are $2,389. Pet. App. 49a ¶¶ A & B. But this issue's significance transcends this statute and these parties. The tension over choosing federal or State law to define who owns otherwise-state-governed entities generates "significant disagreement among courts and commentators . . ." in such substantive areas as the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. *United States v. Bestfoods*, 524 U.S. 51, 63 n.9 (1998); *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1498-1503 (11th Cir.1996). The Seventh Circuit's supplanting State law to resolve this case doesn't respect this Court's admonishing lower courts that instances when federal-common law should displace its State counterpart are "few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963).

Moreover, important issues—requiring this Court's decision—don't necessarily involve high monetary stakes. *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniel v. Williams*, 474 U.S. 327, 329-331 (1986). And focusing exclusively on the delinquent contributions is deceptive: the Seventh Circuit held that the Funds won't be allowed any attorneys' fees if James prevails on this issue. Pet. App. 12a-14a.

Finally, this case's importance is reflected in the fact that it has gained national attention in the funeral-home industry. *Court says principal owner not an employee*, 5 Death Care Business Advisor No. 11 (LRP Publications Dec. 13, 2000), available in LEXIS, Nexis Library, Newsletter Stories file. Because the industry recognizes that the issue is not limited to

one Chicago funeral home, we believe it appropriate for this Court to grant certiorari to address it.

B. The Seventh Circuit's relegating prevailing pension plans to the depressed hourly rate their attorneys charge based on ideological reasons conflicts with the District of Columbia Circuit.

The second problem with the Seventh Circuit's decision is that it equates the market rate for awarding attorney's fees with the Funds' cost, even though their attorneys set those fees at a depressed rate for altruistic reasons. Pet. App. 16a, 123a ¶ 2, 132a ¶ 2. The court set the market rate at this level, despite the fact that:

- employers pay their Chicago law firms attorney's fees in the $300/hour range to defend the Funds' lawsuits; and
- Chicago attorneys that don't base their rates on ideological goals charge the same rates as employer firms.

Pet. App. 126a-127a ¶ 7, 135a ¶ 5, 140a ¶ 4.

The court reasoned that the Funds' counsel "does not have a high, regular rate from which it deviates to make gifts to unions." Pet. App. 16a. This decision is squarely contrary to the District of Columbia's rule that public-spirited attorneys—including those who prosecute ERISA delinquent-contributions cases—who depress their rates to advance social causes are entitled to full-market rates rather than the depressed rates they charge their clients. *Board of Trustees of Hotel & Restaurant Employees Local 25 Health and Welfare Fund v. JPR, Inc.*, 136 F.3d 794, 807 (D.C. Cir.1998); *Covington v. District of Columbia*, 57 F.3d 1101, 1108 (D.C. Cir.1995), *cert. denied*, 516 U.S. 1115 (1996); *Save Our Cumberland Mountains, Inc. v. Hodel*, 857 F.2d 1516, 1524 (D.C. Cir.1988) (*en banc*).

The District of Columbia Circuit's rule is consistent with the courts recognizing "that the *prevailing market rate* and not the *cost* of providing legal services is the measure of a 'reasonable attorney's fee' " under fee-shifting statutes. *Beard v. Teska*, 31 F.3d 942, 956 (10th Cir.1994) (emphasis in original); *accord Buffington v. Baltimore County*, 913 F.2d 113, 129-130 (4th Cir.1990), *cert. denied*, 499 U.S. 906 (1991); *Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1161 (8th Cir.1985), *cert. denied*, 475 U.S. 1011 (1986); *McCann v. Couglin*, 698 F.2d 112, 130 (2nd Cir.1983).

The District of Columbia's rule is not without controversy. Each decision drew published dissents, questioning a standard that awards prevailing parties' counsel more than they actually charge their clients. *JPR, Inc.*, 136 F.3d at 809-810 (Randolph, J., dissenting); *Covington*, 57 F.3d at 1112-1115 (Henderson, J., dissenting); *Hodel*, 857 F.2d at 1525-1534 (Starr, J., dissenting); *see* Andrew P. Sutor, IV, Note, *Covington v. District of Columbia: Judicial clouding of a once clear burden of proof in awards of attorney fees under 42 U.S.C. § 1988*, 41 Vill. L. Rev. 825, 859-864 (1996). The Seventh Circuit sided with the District of Columbia's dissenting judges that unless counsel charge premium rates, their clients are never entitled to full-market rates. Pet. App. 16a. The lines are thus drawn for this Court's authoritative resolution.

Under the Seventh Circuit's rule, only large law firms charging premium rates will be able to recover those rates from delinquent employers. But as Judge Frank Easterbrook noted in *Barrow v. Falck*, 977 F.2d 1100, 1105 (7th Cir.1992), "[s]ome lawyers dedicate their professional lives to causes they find admirable and worthy of support—to legal services for the poor, to the representation of unions. These lawyers are making contributions to their favorite causes, not in money but in time."

The Seventh Circuit's standard will produce the anomalous results *Save Our Cumberland Mountains, Inc. v. Hodel* predicted: either competent, public-spirited counsel will refuse these cases or will resort to questionable billing practices:

> Thus, the practitioner outside the large or established firm may either eschew pro bono representation, directing those potential clients . . . to the established firm or legal aid societies if either of those entities is available and willing to undertake the representation, or quote fictitious but market-based rates, which neither he nor the client have any intention of actually seeing collected *in toto* unless court-awarded fees are ultimately available.

Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d at 1520.

The Seventh Circuit's standard can't be reconciled with this Court's precedent that under fee-shifting statutes, legal services should be valued at their market value, regardless of the attorney-client billing arrangements. *Blanchard v. Bergeron*, 489 U.S. 87, 93 (1989); *Blum v. Stenson*, 465 U.S. 886, 893-896 (1984). Relegating pension plans to the depressed actual rates their attorneys charge is also inconsistent with Congress's goals in enacting ERISA's 1980 amendments. The legislative history to these amendments shows that the legislature sought to "discourage delinquencies" by making collection less "cumbersome and costly." Senate Committee Print at 44. To that end, Congress in ERISA § 502(g)(2)(D) provided that courts "shall" award attorney's fees to prevailing pension plans. 29 U.S.C. § 1132(g)(2)(D). There is no mandatory fee provision for prevailing employers.

From this statutory structure and legislative history, the District of Columbia Circuit held that "[i]f an attorney has made a public-spirited decision to charge a plan a discounted

rate, a delinquent employer should not receive the benefit of this decision." *JPR, Inc.*, 136 F.3d at 805.

Finally, the Seventh Circuit's standard—limiting pension plans to their actual costs—transcends this ERISA context. Although the court recognized that ERISA § 502(g)(2) does not use the phrase "prevailing party," it held that "case law regarding prevailing parties is applicable to this section of ERISA." Pet. App. 17a n.4. Because similarly worded fee-shifting statutes should be similarly construed—in the absence of contrary legislative intent—the Seventh Circuit's standard will infect the hundreds of such statutes. *See Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-525 (1994); *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989); *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986). Because the Seventh Circuit's standard has potentially sweeping implications that will eviscerate Congress's fee-shifting goals, we ask this Court to grant review.

CONCLUSION

The Seventh Circuit's displacing State-law ownership rules for incorporeal entities stands in marked contrast to this Court's refusing to create federal-common law in areas the States have traditionally regulated. It allows employers to use the single-employer doctrine as a shield to avoid contributing to multiemployer plans, generating all the evils Congress tackled when it enacted ERISA's 1980 amendments.

The court's standard for prevailing pension plan's attorney's fees similarly defeats Congress's goals of promoting plans' collecting delinquent contributions "efficaciously," and cannot be reconciled with the District of Columbia's precedent. This Court should grant certiorari to resolve these issues, vacate the Seventh Circuit's judgment, and remand to that court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

DAVID S. ALLEN *
JACOBS, BURNS, ORLOVE,
STANTON & HERNANDEZ
300 West Washington Street
Suite 1200
Chicago, Illinois 60606-2002
(312) 372-1646

Attorney for Petitioner

* Counsel of Record